Volume 83
Issue 1 *Dickinson Law Review - Volume 83, 1978-1979*

10-1-1978

The Requirements for ABA Approval of Law Schools: An Antitrust Analysis of the Means of Accreditation

Richard E. Fehling

Notes

The Requirements for ABA Approval of Law Schools: An Antitrust Analysis of the Means of Accreditation

I. Introduction

Many state courts have promulgated rules demanding that certain educational and personal criteria be met by applicants for their respective bar examinations. One requirement, which has been adopted by Pennsylvania,[1] many of the other forty-nine states, Puerto Rico, and the District of Columbia, is that the applicant must graduate from a law school accredited[2] by the American Bar Association (ABA). Individuals have challenged this demand, alleging violations of civil rights,[3] due process,[4] and equal protection.[5] The cases have led to judicial review of the states' application requirements, and the courts have uniformly found the criteria reasonable, often on the basis of language in *Schware v. Board of Bar Examiners*:[6]

> A State can require high standards of qualification, such as good

---

1. PA. BAR ADMISSION R. 203(2). The Rule is as follows:
   > The general requirements for admission to the bar of this Commonwealth are:
   > * * *
   > (2) Receipt of an earned Bachelor of Laws or Juris Doctor degree from an accredited law school. . . .
   > * * *

Id. The phrase "accredited law school" is defined as "[a] law school accredited by the American Bar Association." *Id.*, Rule 102(a).

Pennsylvania Supreme Court Justice Manderino dissented from the adoption of this requirement, *inter alia*, as an unconstitutional "delegation to a private organization of a portion of the Judicial Authority to regulate the admission to the practice of law in Pennsylvania . . . ." PA. R. CT. at 102 (Desk Copy 1978).

2. In the context of this discussion the term "accreditation" shall denote acceptance of an institution's qualification. The ABA, however, terms such accreditation "approval."

3. Hackin v. Lockwood, 361 F.2d 499 (9th Cir. 1966), *cert. denied*, 385 U.S. 960 (1966).

4. Potter v. New Jersey Sup. Ct., 403 F. Supp. 1036 (D.N.J. 1975) (three-judge court) *aff'd mem.*, 546 F.2d 418 (3d Cir. 1976).

5. Ostroff v. New Jersey Sup. Ct., 415 F. Supp. 326, 328 (D.N.J. 1976).

6. 353 U.S. 232 (1957).

moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law.[7]

A poignant example of the blind affirmation of a state's bar examination requirements is found in *Lombardi v. Tauro*.[8] Although the First Circuit Court expressed regret that Lombardi encountered difficulties in the interface of the Massachusetts requirements, the court nevertheless denied his appeal because both the state's requirement of a degree from a qualified law school and the law school's requirement of a degree from a four-year college were rationally related to their objective that only qualified persons be permitted to practice law.

The adoption by many states of the requirement that bar examination applicants graduate from ABA-accredited law schools reflects the ABA's successful implementation of an express policy: "The American Bar Association believes that every candidate for admission to the bar should have graduated from a law school approved by the American Bar Association . . . ."[9] This language evidences the ABA's desire and intention to control a crucial aspect of every potential applicant's entry into the legal profession. The *fact* of control has been unanimously endorsed by the courts,[10] but the precise *methods* and *criteria* manifested in the ultimate decree of a law school's accreditation must be scrutinized within the context of the antitrust laws to determine whether they impose unreasonable restraints on a potential law student's entry into the legal profession or on the competitive position of the law school.

II. Antitrust Law and Accreditation

A. Accreditation and Evaluation Generally

"Accreditation is the process whereby an association or agency recognizes an institution as having met certain predetermined standards. The process . . . involves establishment of standards of quality

7. *Id.* at 239.

8. 470 F.2d 798 (1st Cir. 1972), *cert. denied*, 412 U.S. 919 (1973). Massachusetts required a bachelor's degree from an approved college, but invoked a grandfather clause that exempted those law students who began law school before September 1966 and had completed one-half of the work required for a bachelor's degree. SUP. JUD. CT. RULES MASS., rule 3:01(3)(1) (1972). Since Lombardi had completed two years of college and had begun law school before the 1966 deadline, he fulfilled the state requirements. Because Lombardi lacked a four-year bachelor's degree, however, he was denied official graduation by the law school and, therefore, was refused the same opportunities to sit for the Massachusetts bar exam as his classmates. 470 F.2d at 799-800 n.2.

9. *Approval of Law Schools: ABA Standards and Rules of Procedure*, § 102 (1977) (hereinafter cited as *ABA Standards*).

10. Lombardi v. Tauro, 470 F.2d 798, 800-01 (1st Cir. 1972), *cert. denied*, 412 U.S. 919 (1973); Hackin v. Lockwood, 361 F.2d 499, 502-03 (9th Cir.), *cert. denied*, 385 U.S. 960 (1966); Ostroff v. New Jersey Sup. Ct., 415 F. Supp. 326, 328-29 (D.N.J. 1976); Potter v. New Jersey Sup. Ct., 403 F. Supp. 1036, 1037-40 (D.N.J. 1975), *aff'd mem.*, 546 F.2d 418 (3d Cir. 1976).

and identification of those institutions which have achieved them."[11] Accreditation by its very nature injures those unable to attain the required standards. It is best accomplished by the peers of the institution under review and is generally not enhanced by judicial intrusion.[12]

The courts have reviewed accreditation standards in previous antitrust actions, but they have proved reluctant to find that the standards unreasonably restrain commerce or the opportunities of those under their aegis. A leading case, *Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges and Secondary Schools, Inc.*,[13] which examines accreditation of an educational institution within an antitrust framework, appears on its face to remove accreditation methods and criteria from judicial review for antitrust violations, yet it establishes the foundations for a successful prosecution of unreasonable, anticompetitive, or unconstitutional accreditation.

B. Marjorie Webster Junior College

Middle States Association of Colleges and Secondary Schools, Inc. (Middle States) was a voluntary, nonprofit educational corporation whose primary activity was accrediting member institutions and applicants for membership. Marjorie Webster Junior College, Inc. applied to Middle States for accreditation, but Middle States maintained a previous policy and refused to consider Marjorie Webster for accreditation because the latter was not a nonprofit organization with a governing board representing the public interest. Subsequent to this refusal, Marjorie Webster sued to compel consideration of its application for accreditation without regard to its proprietary financial structure.

The district judge in *Marjorie Webster* ruled that he must focus his attention not on whether the defendant association was engaged in a trade, but whether plaintiff's trade had been restrained.[14] The court continued,

> A combination which imposes unreasonable restraints on the trade of others is actionable under the [Sherman] Act. An intent

11. Marjorie Webster Jr. College, Inc. v. Middle States Ass'n, Inc., 302 F. Supp. 459, 461 (D.D.C. 1969), *rev'd on other grounds*, 432 F.2d 650 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 965 (1970). For an excellent analysis of accreditation and evaluation, see Oulahan, *The Legal Implications of Evaluation and Accreditation*, 7 J.L. & EDUC. 193, 193-204 (1978).

12. Parsons College v. North Cent. Ass'n of Colleges & Secondary Schools, 271 F. Supp. 65, 74 (N.D. Ill. 1967) (Hoffman, J.).

13. 432 F.2d 650 (D.C. Cir. 1970).

14. 302 F. Supp. 459, 466 (D.D.C. 1969), *citing* American Med. Ass'n v. United States, 317 U.S. 519, 528-29 (1943).

> to restrain trade is not an essential element of the proof. The burden is met if it is shown that the consequences flowing from the activity complained of amounted to a restraint of trade. . . . A violation of the antitrust laws exists if the combining results in a special advantage to members of an association over non-members or deprives the non-member of a significant business service.[15]

A key to the court's decision lies in its determination that operation of an educational institution is commerce and is protected by the antitrust laws.[16] Of further importance is the court's finding that "[a]ccreditation is necessary to engage in effective competition in the field of higher education today."[17] The denial of accreditation is, therefore, a restraint of trade or commerce, and the district court found a violation of the Sherman Act in the unreasonable standards used to deny Marjorie Webster its accreditation.[18]

The circuit court reversed the lower court's holding that the antitrust laws had been violated. The Sherman Act is tailored for the business world, the court reasoned, not for the noncommercial aspects of the liberal arts or the learned professions.[19] The court concluded that accreditation of an educational institution is "an activity distinct from the sphere of commerce; it goes rather to the heart of the concept of education itself."[20]

Since the court believed that Marjorie Webster would be able to operate successfully without accreditation, it accorded the accrediting institution substantial deference in the promotion and application of its standards.[21] If the court had found that denial of accreditation *would* prevent successful operation of the college, the standards and their application would have been subjected to more discriminating analysis.

---

15. *Id.* at 466-67 (citations omitted).

16. *Id.* at 465-66. "Higher education in America today possesses many of the attributes of business. To hold otherwise would ignore the obvious and challenge reality." *Id.* at 466.

17. *Id.* at 469.

18. *Id.* at 471.

19. 432 F.2d 650, 654 (D.C. Cir. 1970). The court cited a footnote from Klor's, Inc. v. Broadway Hale Stores, Inc., 359 U.S. 207, 213 n.7 (1959): "[T]he Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives."

20. 432 F.2d at 655.

21. We do not believe . . . that the record supports the conclusion that appellee will be unable to operate successfully as a junior college unless it is considered for accreditation by appellant.

Accordingly, we believe that judicial review of appellant's standards should accord substantial deference to appellant's judgment regarding the ends that it serves and the means most appropriate to those ends.

Id. at 657 (emphasis added).

C. Applicability of Marjorie Webster to Accreditation of Law Schools

The finding by the circuit court that the accreditation process contained no "commercial objectives" was based at least in part on the "learned profession" exclusion from the antitrust laws, which has been severely restricted in the wake of recent United States Supreme Court decisions and Federal Trade Commission Chairman Pertschuk's remarks drawing the legal profession into the meaning of commerce for antitrust purposes.[22] In *Goldfarb v. Virginia State Bar*[23] the Court ruled that the practice of law was within the realm of commerce as used in the antitrust laws. The Court addressed two facets of the commercial nature of the legal profession. First, the Court recognized that the practice of law, although perhaps not commerce itself, could "affect commerce" by its irremedial necessity in many business transactions.[24] Second, the Supreme Court went beyond merely affecting commerce and found that certain aspects of the practice of law are themselves commerce.[25] Later cases have settled any concerns that the *Goldfarb* inclusion of lawyers within commerce was an aberration.[26]

The circuit court, basing its decision on a finding that denial of accreditation did not actually injure Marjorie Webster Junior College, deferred to Middle States' accreditation requirements.[27] But in a state that requires graduation from an accredited law school for a person to take the bar examination, it is folly to suggest that a law school is not competitively injured by a denial of accreditation. Denial of accreditation would prove even more disastrous should the ABA prove successful in its drive to require graduation from an accredited law school for all applicants to bar examinations throughout the nation.[28]

The latitude afforded Middle States' accrediting standards in *Marjorie Webster* must be denied in the case of accreditation of educational institutions such as law schools.[29] Although, as mentioned

---

22. 844 ANTITRUST & TRADE REG. REP. (BNA) at A-14 (12/22/77) (speech entitled "New Directions for the FTC" delivered in November 1977 before the 11th New England Antitrust Conference).

23. 421 U.S. 773 (1975).

24. *Id.* at 788.

25. *Id.* at 787-88. A footnote to this discussion warns that the court has decided to consider the practice of law as commerce in *Goldfarb*, but the bar should not expect it to do so again. *Id.* at 788 n.17.

26. *See, e.g.*, Bates v. State Bar of Arizona, 433 U.S. 350 (1977), in which the Court remarked, "[T]he belief that lawyers are somehow 'above' trade has become an anachronism . . . ." *Id.* at 371-72.

27. *See* note 21 and accompanying text *supra*.

28. *See* note 9 and accompanying text *supra*.

29. The *Marjorie Webster* courts heard no arguments that the nonaccreditation of the school injured the students' professional aspirations. They heard only that high school stu-

earlier, the *fact* of accreditation is beyond dispute, analysis of the accreditation requirements imposed on law schools must be undertaken in a traditional antitrust investigation. The ensuing examination assumes that accrediting institutions and their procedures are judicially reviewable as imposing potentially unreasonable restraints on competition, with effects on both the law schools and their students.[30]

III. Rule of Reason Analysis of the ABA/AALS Standards for Accreditation

Because the Interpretations of the ABA Standards and the Approved Association Policy statements explaining the American Association of Law Schools (AALS) By-Laws are accorded great weight in decisions on approval and accreditation, these published statements must be considered in conjunction with the actual requirements in any judicial review.

A. The Rule of Reason

Accreditation of law schools is not, in and of itself, a per se violation of the antitrust laws. Absent a finding of a per se violation, any alleged restraints of trade must be subjected to a determination of their reasonableness. The checklist of reasonableness to which myriad courts have referred, including the courts in *Marjorie Webster*,[31] is found in Justice Brandeis' opinion in *Chicago Board of Trade*.[32]

> [T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. *The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition*. To determine that question the courts must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.[33]

---

dents who realize that they may not transfer their credits to a four-year college would not attend Marjorie Webster. The growing number of accredited junior colleges and four-year colleges, however, provides those students with alternative avenues to higher education. No such alternatives have arisen for college graduates who wish to pursue a career in the legal profession. They may be denied that opportunity because new law schools cannot develop in the face of possibly over restrictive accreditation requirements.

30. A full development of the elements of an antitrust action against accrediting institutions is presented in Oulahan, *supra* note 11, at 211-22.

31. 302 F. Supp. at 467; 432 F.2d at 653 n.8.

32. Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918).

33. *Id.* at 238.

B. *Specific Requirements for Accreditation*

1. Number of Full-time Faculty.—One objection raised about accreditation might be the requirements of a minimum number of full-time faculty—six by the ABA[34] and four by the AALS.[35] Neither the ABA nor the AALS offer any rationale for the selection of these magic numbers, nor do they really need to do so. A federal court reviewed the Arizona requirement that applicants for entrance to its bar must have graduated from an ABA-accredited law school. In upholding the requirement, the court remarked, "Once we conclude that *some* restriction is proper, then it becomes a matter of degree—the problem of drawing the line."[36] The court will not declare the line drawn unreasonable without strong proof thereof offered by the complainant. The fact that the ABA and AALS differ in the minimum number required is helpful to plaintiff, but is certainly not enough in itself to satisfy the burden of proof. This is particu-

---

34. (a) The law school shall have not fewer than six full-time faculty members, in addition to a full-time dean and a law librarian. It shall have such additional members as are necessary to fulfill the requirements of this Chapter and the needs for its educational program, with due consideration for
    (i) the size of the student body and the opportunity for students to meet with and consult faculty members on an individual basis,
    (ii) the nature and scope of the educational program, and
    (iii) adequate opportunity for effective participation by the faculty in the governance of the law school.

ABA Standards, supra note 9, § 402(a).

Interpretation 1 of 402(a): The intent of Standard 402(a) is that a single division law school in its first year of operation should have a minimum of six full-time faculty, in addition to a full-time dean and law librarian. A dual division law school or a law school offering instruction in more than one year must have additional full-time faculty in a satisfactory proportional ratio.

Memorandum 7778-27, *Interpretations of the American Bar Association Standards and Rules of Procedure for Approval of Law Schools* 18 (ABA Section of Legal Education and Admissions to the Bar 1978) (hereinafter cited as *ABA Interpretations*).

35. Section 6-1. To the end that high standards of legal education be fostered, each member school shall maintain:

* * *

4. A faculty of high competence and suitable size, vested with primary responsibility for determining institutional policies.

* * *

Association of American Law Schools, *Association Information* § 6-1(4) (1978) (hereinafter cited as *Association Information*).

Upon the full-time faculty members rest the major burdens of planning and executing the institution's instructional work. Not even a school with the narrowest possible program and with only a few students could meet its obligations with fewer than four full-time faculty members and a law librarian in addition to the dean (who except in case of emergency should devote full time to the school's administration and instruction). An effective program cannot be maintained in all its ramifications when the student-teacher ratio becomes too large for ready professional relationships. In 1956-1957, the average number of students per full-time professor in member school was 16.5; the median was 22. Only eight schools had as many as 50 students for every full-time faculty members. (Anatomy of Modern Legal Education, 1961, at pp. 326-328.) So large a number raises serious doubt about the adequacy of faculty resources.

Id., at 7 (Approved Association Policy for § 6-1(4)).

36. Hackin v. Lockwood, 361 F.2d 499, 503 (9th Cir. 1966), *cert. denied*, 385 U.S. 960 (1966) (emphasis in original).

larly so in light of the expressed differences in viewpoint between ABA approval and AALS membership.[37]

Although arguments can be raised both for and against the minimums, this particular requirement would probably be found reasonable by the courts. A point raised in defense of the minimums might be that the ABA's number is the actual standard, but the AALS' is a policy statement and thus presumably less definitive and subject to alteration. A possible argument against the minimum number could be that since both the ABA and AALS have established minimum student-to-faculty ratios, additional restrictions on the law school may be unnecessarily burdensome. This latter position could be rebutted, however, by the argument that the field of law is too broad for any one, two, three, or five full-time faculty members to grasp fully and to effectively keep abreast of its developments; hence, a minimum of four or six is required.

2. Deans, Librarians, and Assistant Administrative Personnel.—Both the ABA and the AALS exclude from consideration as full-time faculty the law school dean and law librarian.[38] The obvious nonacademic demands upon their time certainly prevent the type of devotion to classes and students that is essential for a full-time professor. The ABA, however, goes beyond these exclusions and does not recognize as full-time faculty assistant or associate deans or any other person involved in the administration of the law school. Apparently the exclusion rests with the title, regardless of the amount of time or energies required in administration. The only rationale proffered by the ABA is that this is the "historic interpretation of Standard 402."[39]

The ABA has expressly determined that "[a] full-time faculty

---

37. The ABA acts largely because of the concern and responsibility of the judiciary and the practicing bar for the quality of the places where new generations of lawyers are being trained, while the AALS represents primarily the concerns of the academic community. In addition, the AALS has a special responsibility because of the need for educational institutions to determine whether the holder of a law degree from one school is worthy of admission for advanced study or appointment or advancement in the educational world.

Memorandum, *Memorandum in Response to Inquiries About Accreditation* (AALS, undated) (on file in office of Dickinson Law Review).

38. *See* note 33 *supra*, for the text of the ABA Standard.

Interpretation: The historic interpretation of Standard 402 by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association and its Accreditation Committee has been that the count of full-time faculty, under the provisions of Standard 402, does not include the dean, librarian, associate or assistant deans or other administrators holding academic appointment. The interpretation of Standard 402 by the Council and its Accreditation Committee continues to be that of not including the dean, librarian, associate or assistant deans or other administrators holding academic appointment, in any computation of full-time faculty, under the provisions of Standard 402.

ABA Interpretations, *supra* note 33, at 17-18.

For the AALS By-Law and Policy, see note 43 *infra*.

39. *ABA Interpretations*, *supra* note 33, at 17.

member is one who during the academic year devotes substantially all his working time to teaching and legal scholarship . . . ."[40] The requirement is "substantially all his working time" and not *all* of his time. Clearly the express Standard envisions some outside interests and activities of persons reasonably considered to qualify as full-time faculty. Further imposition of these specific exclusions protects legal academicians by requiring more of them, which unnecessarily burdens the law school.

3. "Of Counsel" Attorneys.—The same protection of legal academicians arises in the ABA Standard 402(b) requirement of "no outside office or business activities."[41] In ABA Interpretation One of 402(b), the ABA expressly prohibits "of counsel" attorneys from attaining full-time faculty status.[42] Another Interpretation further limits its potential outside employment of professors: "A full-time faculty member of an ABA approved law school who is teaching an additional full-time load at another ABA approved law school cannot be considered as full-time faculty for either institution".[43] Full-time teaching at one school and less than full-time teaching at another, even if only by one credit, apparently would allow a faculty member to be regarded as full-time at the former. Also, full-time teaching at an approved school and full-time teaching at a nonapproved school would result in recognition as a full-time faculty member at the former. The absence of substantial difference between either of the above nonfull-time positions and the advisory "of counsel" designation may be pronounced enough to evoke a judicial determination of unreasonableness in the exclusion of the latter from "full-time" consideration.

Resort may be successfully made to the AALS requirements for full-time faculty consideration. The AALS avoids express inclusions or exclusions, but rather proposes a series of guidelines for determination of whether a teacher is full-time.[44] A summary of these

---

40. *ABA Standards, supra* note 11, § 402(b). The full text of the section is as follows:

> (b) A full-time faculty member is one who during the academic year devotes substantially all his working time to teaching and legal scholarship, has no outside office or business activities and whose outside professional activities, if any, are limited to those which relate to his major academic interests or enrich his capacity as scholar and teacher, or are of service to the public generally, and do not unduly interfere with his responsibilities as a faculty member.

Id. If the latter requirement is fulfilled and outside activities of a professor "do not unduly interfere with his responsibilites as a faculty member," what business is it of the ABA to restrict the course of his affairs.

41. *Id.*

42. *ABA Interpretations, supra* note 33, at 19.

43. *Id.*, at 18.

44. (b) *Size.* A faculty composed largely of full-time teachers is the very heart of a successful program of legal education. Full-time teachers are those who devote substantially their entire time to their responsibilities as teachers, scholars, and educators. This does not

guidelines suggests that the outside professional activity *should*: (1) be within the major field of the teacher; (2) be novel and enriching; (3) not interfere with the teacher's regular presence and availability at the law school; and (4) be characterized as public service as opposed to promotion of private purposes.[45]

No reason exists why the ABA cannot adopt a set of guidelines similar to those proffered by the AALS for consideration of a faculty member as full-time. Since an alternative approach is so readily available, the ABA has no reasonable grounds to adopt the totally restrictive and unnecessarily burdensome restraints. The express exclusions should be overthrown and resort made to a more flexible and reasonable series of guidelines.[46]

4. Faculty Salaries.—

> The compensation paid faculty members should be sufficient to attract and retain persons of high ability and should be reasonably related to the prevailing compensation of comparably qualified private practitioners and government attorneys and of the judiciary. *The compensation paid faculty members at a school seeking approval should be comparable with that paid faculty members at similar approved law schools in the same general geographical area.*[47]

ABA Standard 405(a) is precariously close to presenting a per se violation of Sherman Section 1 as a form of price fixing. Clause One of the first sentence safely requires a salary sufficient to attract and re-

---

preclude professional activities outside the law school if so limited as not to divert the faculty member from his primary interest and duty as a legal educator.

In determining whether outside professional activities are properly limited, the following factors, among others, are of great importance:

i. The extent to which the field of outside activity coincides with the full-time teacher's major fields or interest as a scholar and teacher;
ii. The character of the professional activity as a source of novel and enriching experience that can be directly utilized in his capacity as an educator;
iii. The degree to which the demands of the outside activity interfere with the teacher's regular presence in the law school and with his availability for consultation and interchange with students and colleagues; and
iv. The extent to which the outside activity may properly be characterized as public service, as distinct from the pursuit of private purposes.

Association Information, supra note 34, at 7 (Approved Association Policy for § 6-1(4)). AALS accreditation is based on a law school's compliance with criteria promulgated from an academic stance; ABA accreditation requirements are developed from a professional stance. The two sets of requirements are often conjunctive.

45. *Id.*

46. One court supported flexible accreditation guidelines against an attack on their vagueness as follows:

> The standards of accreditation are not guides for the layman but for professionals in the field of education. *Definiteness may prove in another view, to be arbitrariness.* The Association was entitled to make a conscious choice in favor of flexible standards to accommodate variation in purpose and character among its constituent institutions, and to avoid forcing all into a rigid and uniform mold.

Parsons College v. North Cent. Ass'n of Colleges and Secondary Schools, 271 F. Supp. 65, 73 (N.D. Ill. 1967) (emphasis added). The ABA's arbitrary refusal to permit professors' outside activities forces legal education into Judge Hoffman's "rigid and uniform mold."

47. *ABA Standards, supra* note 9, § 405(a) (emphasis added).

tain qualified teachers. The Standard is also arguably safe in the requirement that faculty salaries be "reasonably related" to private practitioners' compensation. But the provision that faculties at "similar approved law schools in the same general geographical area" receive "comparable" compensation steps into the bounds of restraint of trade. If the law school successfully "establish[es] and maintain[s] conditions adequate to attract and retain a competent faculty,"[48] by paying compensation "sufficient to attract and retain persons of high ability," a further requirement that the compensation be comparable to that paid at another law school is blatantly protective of legal academicians.

Despite the clearly unreasonable nature of this Standard, two factors eliminate most chances for a successful action based on it. The first factor is that the subsection is couched in terms of "should be" not of "must be" or "shall be" and, therefore, does not seem to be a requirement, but merely a suggestion. The second factor is similar and even more convincing. An Interpretation of this Standard requires that subsection (a) of the Standard "be read as *one* of the things to consider when determining whether" the school has established conditions necessary "to attract and retain a competent faculty."[49] Obviously, the ABA has provided a mere checklist of possible conditions a law school might fulfill to assemble a proper faculty. "Comparable" salaries are not required at all.

IV. Conclusion

The American Bar Association has firmly established its control of the process of entrance into the legal profession. Attacks on the *fact* of delegation of law school accreditation to the ABA have proved singularly unsuccessful. Further attempts to break the grasp that the ABA has developed must concentrate on the particular requirements that it has promulgated and the methods it has employed in enforcing them. The concentration should grow from the traditional antitrust "rule of reason" analysis and may require line-by-line scrutiny both of requirements and published policy. Only with this presentation made to them, will the courts be able to pierce the apparent rationality of ABA accreditation. Only after piercing the

48. Section 405 begins with the directive that "[t]he law school shall establish and maintain conditions adequate to attract and retain a competent faculty." *Id.*

49. *ABA Interpretations, supra* note 43, at 19. The full Interpretation reads as follows:

> Interpretation 2: Subsection (a) of 405 must be read as one of the things to consider when determining whether the requirements of Section 405 "to establish and maintain conditions adequate to attract and retain a competent faculty" are met. The word "similar" does not exclude state supported schools, nor exclude national, as opposed to "regional" schools.

Id.

surface may courts prevent the ABA from erecting overly prohibitive barriers in the paths of persons aspiring to enter the legal profession.

RICHARD E. FEHLING*

* [Assisted by Paul D. Roy, Dickinson School of Law, Class of 1979]